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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-528

NONNEWAUG REGIONAL SCHOOL DISTRICT No. 14,
TOWN OF BETHLEHEM,
Petitioners,

vs.

JOSEPH M. SCOTT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS N. SULLIVAN
Attorney for Nonnewaug School District No. 14
632 Prospect Avenue
Hartford, Conn. 06105

DONALD J. DENEEN
Attorney for Town of Bethlehem
20 Maple Avenue
Windsor, Conn. 06095

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NONNEWAUG REGIONAL SCHOOL DISTRICT No. 14,
TOWN OF BETHLEHEM,
Petitioners,

vs.

JOSEPH M. SCOTT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners Nonnewaug Regional School District No. 14, and Town of Bethlehem, Connecticut, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit rendered on July 23, 1975 affirming the judgment of the Honorable Jon O. Newman, U. S. District Court for Connecticut.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, entered on July 23, 1975 is at this time unreported. It is set forth in Appendix A, pp. la *et seq.*

The opinion of the United States District Court for the District of Connecticut, entered on November 22, 1974, is also unreported and is set forth in Appendix B. pp. lb *et seq.*

II.

JURISDICTION

This suit was originally commenced in the United District Court with jurisdiction sought pursuant to 28 U.S.C. sections 1343 (3) and injunctive relief pursuant to 42 U.S.C. sections 1983. The District Court granted plaintiff's motion for summary judgment on November 22, 1974 and entered judgment for plaintiff on January 8, 1975 (Appendix B). Upon appeal, the Court of Appeals for the Second Circuit affirmed the judgment on July 23, 1975 (Appendix A). The jurisdiction of the Supreme Court is invoked, under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254 (1) on the ground that review by the Supreme Court by a Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

III.

QUESTIONS PRESENTED

Does the one-person-one-vote rule apply to the election of members of the board of education of a regional school district created pursuant to the provisions of the Connecticut General Statutes?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions: Fourteenth Amendment.

Statutes: Title 28, United States Code, Sections 1254(1) and Sections 1343(3); Title 42, United States Code, Section 1983; Connecticut General Statutes, Sections 10-46, 10-47,

10-51, 10-56, 10-60, 10-220, 10-221, 10-240, 10-241, 10-241a, 10-242, 10-262.

Rules: Rule 19, Supreme Court Rules.

V.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Connecticut, by the Plaintiff, a citizen, elector and taxpayer of the Town of Woodbury, Connecticut to obtain a permanent injunction requiring the reorganization of Nonnewaug Regional School District No. 14. Jurisdiction was based on 28 U.S.C. Sections 1343(3) and injunctive relief sought pursuant to 42 U.S.C. Sections 1983. Plaintiff complained that the allocation of membership on the regional district's board of education deprived the electors of the Town of Woodbury of equal protection of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Nonnewaug Regional School District No. 14 was established by the Towns of Woodbury and Bethlehem, Connecticut on May 20, 1968, by a vote of the majority of the electors in each of the towns. It was organized pursuant to and now operates under the provisions of the Connecticut General Statutes pertaining to regional school districts. Under Section 10-47 of the Connecticut General Statutes, such a regional board is not possessed of general governmental powers, but is vested with very specific and restricted powers. General governmental powers with regard to the public school system are vested in the towns themselves.

The Regional Board of Education serving the Nonnewaug Regional School District consists of eight members, four elected from each of the two towns. According to the 1970 United States Census of Population, the respective

populations are 5,869 for Woodbury and 1,923 for Bethlehem; the respective electorates are 3,653 for Woodbury and 1,298 for Bethlehem.

The basis for determining the size and composition of a regional school board is determined by statutory procedure which requires approval by referendum held in each participating town. (Conn. Gen. Stat. Section 10-46.)

VI.

ARGUMENT

The One-Person-One-Vote Principal of Constitutional Law is not Applicable to the Election of Members of the Board of Education of a Regional School District Created Pursuant to Provisions of the Connecticut General Statutes.

A.

The constitutional principle of one-person-one-vote, first enunciated in *Baker* v. *Carr,* 369 U.S. 186 (1962) and extended in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), was held applicable in *Avery* v. *Midland County,* 390 U.S. 474 (1968) to "units of local government having general governmental powers over the entire geographic area served by the body." Id., at 485. The Court in *Avery,* however, recognized that the Midland County Commissioner's Court "is representative of most of the general governing bodies of American cities, counties, towns, and villages", id. at 483 and warned against a too liberal application of the rule:

> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Id at 485.

In *Sailors* v. *Board of Education,* 387 U.S. 105 (1967) and *Hadley* v. *Junior College District* (1970), this Court considered the applicability of the one-person-one-vote rule to the method of selecting members of two school boards. In *Sailors,* the governing board of education was found to be appointive, not elective, and to be performing essentially adminstrative functions. Consequently, the one-person-one-vote principle was held inapplicable. Commenting on *Sailors* and its companion case, *Dusch* v. *Davis,* 387 U.S. 112 (1967), this Court later observed in *Avery,* supra, that:

> The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called "the emergence of a new idealogy and structure of public bodies, equipped with new capacities and motivations . . ." R. Wood 1400 Governments, at 175 (1961). Id. at 485.

In *Hadley,* this Court reviewed a statutory scheme for the election of a board of trustees for a regional junior college district which diluted the votes of the electors in the more populous districts comprising the junior college district. After a discussion of the powers exercised by the board of trustees, the Court found application of the one-person-one-vote principal to election of its members constitutionally required:

> Appellants in this case argue that the junior college trustees exercised general governmental powers over the entire district and that under *Avery* the State was thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions

to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college their powers are equivalent, for apportionment purposes, to those exercised by the County Commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the district, and we think these powers are general enough to have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here. Id. at 53.

Nevertheless, the *Hadley* Court, quoting from *Sailors, supra,* echoed the cautionary note found in *Avery, supra*:

> As we said before, "(v)iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in muncipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. Id. at 59.

This reference to *Sailors* by the *Hadley* Court is of peculiar interest in light of its enunciation of the general rule that:

> (W)hen a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as it is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. Id. at 56.

With *Salyer Land Co.* v. *Tulare Water District,* 410 U.S. 719 (1973) and *Associated Enterprises, Inc.* v. *Toltec,* 410

U.S. 743 (1973), this Court limited application of the one-person-one-vote rule as it had developed through earlier decisions. In *Salyer,* the Court held the rule inapplicable to election of members of the governing board of a California Water District which has the statutory power to contract for the construction of district projects; the power to condemn private property for use in such projects; the authority to issue general obligation bonds; the power of eminent domain; the power to employ and to dismiss persons on a regular staff; the authority to provide for the generation and distribution of hydro-electric power; and the power to fix tolls and charge for the use of water, and to collect them from persons receiving services in proportion to the services rendered. *Salyer,* at 723-724 and 728 n.7.

Despite the possession of such governmental powers the majority of this Court held that the one-person-one-vote principle does not apply to such a governmental arrangement:

> The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin. It provides no other general public services, such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. App. 86. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundares, and it does not have a fire department, police, buses, or trains. *Ibid* Id. at 728-729.

B.

The decision of this Court in *Salyer, supra,* resulting from a careful analysis of the governmental powers possessed by the Tulare Water District demonstrates the utility of

such an analysis in cases which involve the application of the one-person-one-vote rule to cooperative governmental efforts. An assessment of the powers possessed by the boards of education of Connecticut regional school districts must lead to the conclusion that the one-person-one-vote rule is not applicable to the election of members of such boards.

In Connecticut the respective powers of the school district, and its governing body, the school board, are carefully delineated and distinguished by the following state statutes: 10-46, 10-47, 10-51, 10-53, 10-56, 10-60, 10-220, 10-221, 10-240, 10-241, 10-241a, 10-242, and 10-262. General Statutes Section 10-240 provides that:

> Each town shall maintain the control of all the public schools within its limits and for this purpose shall be a school district and shall have all the powers and duties of school districts, except so far as such powers and duties are inconsistent with the provisions of this chapter.

The intent of Section 10-240 was to transfer control of all the public schools within the town to the town itself, with each town constituting a separate school district. See *Keegan* v. *Town of Thompson,* 103 Conn. 418, 130A. 707 (1925). *Second School District of Glastonbury,* 86 Conn. 590, 86A. 577 (1913). General Statutes Section 10-241 provides that "(e)ach school district shall be a body corporate" with certain powers, including the power to lay taxes. Section 10-242 establishes the annual town meeting as the annual school district meeting.

The duties of the school board as distinct and separate from the power vested solely in the school district, are found in Conn. Gen. Stat. Section 10-220 which provides that boards of education shall maintain in their several towns good public elementary and secondary schools and shall promote the educational interests of the State. The

terms "school district" and "school board" are not used interchangeably in the statutes and while, for example, school districts in Connecticut do have the power to levy and collect taxes, it is clear that Connecticut school boards do not possess such power.

When the Connecticut legislature adopted its statutory scheme for the creation of regional school districts, the distinction between the powers possessed by the school district and those possessed by the school board was maintained and made a part of the regional school laws. Thus Conn. Gen. Stat. Section 10-56 provides in part:

> A regional school district shall be a body politic and corporate with power to sue and be sued; to purchase, receive, hold and convey real and personal property for school purposes; and to build, equip, purchase, rent, maintain or expand schools. Such district may issue bonds in the name and upon the full faith and credit of such district and the member towns to acquire land, prepare sites, purchase or erect buildings and equip the same for school purposes, if so authorized by referendum.

The powers enumerated in Section 10-56, powers which may be described as important governmental powers, are vested in the regional school *districts,* i.e., in the voters of such districts qualified to vote at the regional school district meeting. They are *not* possessed by regional school boards. The primary function of the regional school board is to administer the affairs of the regional school district. In addition, while Section 10-60 of the Connecticut General Statutes refers to a power to issue bonds as provided in Section 10-56, a reading of that statute makes clear that the power to authorize the issuance of bonds lies exclusively with the voters of the school district at the regional school district meeting. Indeed, to borrow money at all, the regional board of education must have the authorization of

a majority of the region's voters present at a regional district meeting called specifically for the purpose of obtaining such authorization. And, while a regional board of education has the duty to prepare an estimated budget for the region, the power to *adopt* a budget lies exclusively with the voters at a regional school district meeting as provided in Section 10-51.

In Connecticut, it is the regional school district, operating through the school district meeting, which possesses general governmental powers, which powers are exercised in accordance with the one-person-one-vote principal. The lack of such powers in regional boards of education in Connecticut clearly exempts them from this constitutional mandate.[1]

The distinction between the essentially administrative powers possessed by regional school boards in Connecticut and the broad governmental powers vested in the voters of regional school districts and exercised at the district meeting is readily discernible upon a reading of the relevant statutes. These statutes evidence a legislative intent that Connecticut's traditionally autonomous towns retain some control of the administration of their local schools, even upon regionalization. The vehicle for retention of such control is a statutory scheme which permits towns equal representation on the regional school board while, at the same time, vesting the region's voters with the district's important governmental powers, which powers they exercise at the regional district meeting, on a one-person-one-vote basis. The result is a mechanism of local government meeting legitimate local needs without diluting the vote of the regional school district voters when it comes to the exercise of important governmental functions.

1. Judge Oakes' opinion in the Court of Appeals decision recognizes the Regional Board's limited power to propose and initiate in the area of school financing with the ultimate and final authority in the voters to approve or disapprove such proposals (See Appendix Page 6a).

Residents of large and small towns alike benefit economically from the cooperative educational effort which regionalization brings: a combining of resources among towns to provide for more efficient school operation with a resultant improvement in educational programs. In addition, regionalization is encouraged by the state through the legislative provision for a greater portion of state aid (through the "average daily membership grant") to regional school districts as opposed to local school districts, thus easing the tax burden of local towns. (Conn. Gen. Stat., Section 10-262). The legislative intent to encourage regionalization is further evidenced by the requirement found in Conn. Gen. Stat. Section 10-39 which requires the State Board of Education to promulgate regulations setting standards governing the formation of regional school districts with respect to those factors which bear on "the achievement of more efficient administration of a school district and efficacious education of the pupils therein." And although each member town is required to have at least one representative on the regional board of education, there can be no doubt that the otherwise unfettered discretion towns have in apportioning membership on the board upon formation of the district greatly encourages regionalization. (General Statutes, Section 10-46).

It is, of course, true that after *Avery*, a mechanism of local government which has general governmental authority cannot be comprised of officers who are elected on other than a one-person-one-vote basis even if it meets legitimate local needs. But, even this Court's decision in *Hadley* does not require the application of the one-person-one-vote rule to all regional school administration schemes without regard to their differences and unique characteristics. Such a non-discriminatory application would unduly discourage the development of cooperative governmental efforts in the area of public education and necessitate the imposition of

constitutional requirements beyond those laid down in *Avery*.

Since the legislative scheme for the creation of regional school districts in Connecticut does not result in regional school boards with general governmental powers, the one-person-one-vote principle should not be found applicable to election to membership on such boards.

Respectfully Submitted,

THOMAS N. SULLIVAN
SULLIVAN, LETTICK & SCHOEN
632 Prospect Avenue
Hartford, Connecticut 06105
Counsel for the Appellant Nonnewaug Regional School District No. 14

DONALD J. DENEEN and ANDREW G. MESSINA, JR.
O'MALLEY, DENEEN, MESSINA & OSWECKI
20 Maple Avenue
Windsor, Connecticut 06095
Attorneys for Appellant Town of Bethlehem

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 845, 898-99, 921-22—September Term, 1974.

(Argued June 6, 1975 Decided July 23, 1975.)

Docket Nos. 75-7001, 75-7009, 75-7015, 75-7039-40

JOHN E. BAKER and GERALDINE S. GEORGE,
Appellees,

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, HENRY W. BENEDICT, JAMES BERRY, SIDNEY SVIRSKY and JEAN HANNA,
Appellants.

JOSEPH M. SCOTT, SR.
Appellee,

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, *et al.*,
Appellants.

B e f o r e—SMITH, ANDERSON and OAKES, *Circuit Judges.*

Appeal from a decision of the United States District Court for the District of Connecticut, Jon O. Newman, *Judge,* which held on motion for summary judgment that certain Connecticut regional school boards performed a range of activities sufficiently extensive to require the application of one person-one vote principles. Held that not-

withstanding the fact that the boards in question could neither levy taxes nor issue bonds, their powers were governmental in nature, thus requiring that election to the boards be in accordance with one person-one vote principles.

OAKES, *Circuit Judge:*

At issue in this appeal is the applicability of one person-one vote principles (*Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Wesberry* v. *Sanders*, 376 U.S. 1 (1964)) to the election of school board members in two Connecticut regional school districts.[1] The districts in question are each comprised of towns with substantial population differences, but, as presently organized, each participating town has an *equal* number of elected representatives serving on the regional school board and voting with equal weight. The United States District Court for the District of Connecticut, Jon O. Newman, *Judge*, relying on *Hadley* v. *Junior College District*, 397 U.S. 50 (1970) (trustees of a junior college school district performing governmental functions must be elected in accordance with one person-one vote standards); *Avery* v. *Midland County*, 390 U.S. 474 (1968) (applying one person-one vote standards to the election of county officials); *Rosenthal* v. *Board of Education of Central High School District #3*, 497 F.2d 726 (2d Cir. 1974) (finding a substantial federal question presented by a requested application of one person-one vote principles to an elected school board which had the power to issue bonds and propose taxes); *Leopold* v. *Young*, 340 F. Supp. 1014 (D. Vt. 1972) (applying one person-one vote standards to a school board with substantial public functions),

1. A number of other districts throughout Connecticut will presumably be affected by this decision since most, although not all, of Connecticut's regional boards are not apportioned on the basis of one person-one vote. The statutes under which regional school districts were created did not require malapportionment, but permitted towns to agree among themselves on the terms of their consolidation.

held, on motion for summary judgment, that the school boards in question performed a range of governmental activities sufficiently extensive to require the application of one person-one vote principles.[2] We affirm.[3]

The facts presented by these two consolidated appeals are the same in all significant aspects. The school district in *Scott*, Connecticut Regional District No. 14 (Nonnewaug), is comprised of two towns, Woodbury (population 5,869) and Bethlehem (population 1,923). As of May, 1973, 1,887 pupils were attending the school district with 1,385 from Woodbury and 492 from Bethlehem. For each of the three years ending with 1973-74, Woodbury contributed to the regional district budget in an amount equal to two and one-half times the amount contributed by Bethlehem. Each of the towns, however, is equally represented on the regional school board by four members.

The school district in *Baker* is comprised of three towns, Bethany (population 3,857), Woodbridge (population 7,673), and Orange (population 13,524). The average[4] number of pupils in the district is 3,377, with 543 pupils from Bethany, 998 from Woodbridge and 1,835 from Orange. Orange contributed in 1972-73 55.04 per cent of

2. In fashioning a remedy for these constitutional violations, Judge Newman, whose opinion is unpublished, granted declaratory relief only. His denial of injunctive relief was premised on his unwillingness "to disrupt on-going educational activities pending legislative action." In response to Judge Newman's decision, we are advised, the Connecticut General Assembly has enacted contingency legislation which would apply one person-one vote principles to school districts, while providing that towns so inclined may withdraw from regional school districts. (H.R. Bill No. 6596.)

3. Jurisdiction is grounded upon 28 U.S.C. § 1343(3), and injunctive and declaratory relief was sought under 42 U.S.C. § 1983, 28 U.S.C. § 2201. A three-judge court is not required as there is no facial attack on the Connecticut statutes which create regional boards, and any special acts involved relate only to the particular district involved and hence are not of statewide applicability.

4. An average student census was compiled from the actual daily membership as of June, 1973; October, 1973; and February, 1974.

the total school budget, with Bethany's share amounting to 15.62 per cent and Woodbridge's 29.34 per cent. However, each of the three towns is equally represented on the regional board by three members. In both districts, the members of the boards are selected through an elective process.[5]

Plaintiffs-appellees in both *Scott* and *Baker* are residents, taxpayers and electors of Woodbury and Orange respectively,[6] who claim that the present apportionment on their regional boards of education dilutes their voting power and deprives them of the equal protection of the law. The critical question on this appeal therefore is whether these school boards are elective bodies performing regulatory functions of a kind that can be characterized as governmental. *Hadley* v. *Junior College District,* 397 U.S. at 53-54. An affirmative answer to this question requires the additional finding that the boards are constructed unconstitutionally, since all parties concede that their members are not elected according to strict one person-one vote principles, nor do they vote in accordance with any kind of weighted formula which would reflect the population differences in the towns they represent.

The towns in *Scott* elect members directly to the school board; the towns in *Baker,* however, maintain that their regional board is not elective in the sense the Supreme Court intended for application of the one person-one vote principle. The essence of this claim is that the board

5. See text at note *7 infra.*

6. The *Baker* appellants maintain that this court's jurisdiction has been improperly invoked through "collusive joinder." Their theory seems to be that voters of the town are not the real parties in interest here. Fed. R. Civ. P. 17(a). It is, however, the electors whose vote is being diluted and as such their interests are quite properly before the court. This is clearly not a case where collusion has been used to manufacture diversity jurisdiction.

members are "appointed" through a "legislative" town meeting[7] rather than elected through a "popular election." We find no merit to this line of argument. While the forum for selecting board members was a town meeting, any person who was an elector of the town had the right to cast a vote at the meeting, and the majority prevailed. The suggested distinction is one of form, not substance.

On the question whether the board is governmental in character, appellants make much of the powers which the school boards lack. By reading *Hadley* v. *Junior College District* as narrowly as possible, they maintain that, since the Connecticut regional boards lack the powers to levy and collect taxes and to issue bonds, then their powers are not sufficiently broad or general to be governmental. But as Judge Newman recognized in his opinion below, "[t]he proper question is rather whether the power the Boards *do* have, in fulfilling what 'has traditionally been a vital governmental function,' *Hadley* v. *Junior College District,* 397 U.S. at 56, make it reasonable to describe the board members as 'governmental officials in every relevant sense of the term.' *Ibid.*"

The powers of Connecticut's regional school districts are detailed in what is now Chapter 164 of the Connecticut General Statutes,[8] with Conn. Gen. Stats. § 10-47 providing as follows:

7. In the traditional town meeting, a moderator is chosen by the assembled electors of the town, and thereafter the meeting is conducted as if it were a parliamentary body.

8. The *Baker* appellants maintain that there are material facts in issue concerning the powers of the boards so as to preclude a summary judgment. Because the regional boards' powers are statutory and are for our purposes unambiguous summary judgment was properly rendered in the present case. *See Leopold* v. *Young,* 340 F. Supp. at 1015.

> Regional boards of education shall have all the powers and duties conferred upon boards of education by the general statutes not inconsistent with the provisions of this part. Such boards may purchase, lease or rent property for school purposes and, as part of the purchase price may assume and agree to pay any bonds or other capital indebtedness issued by a town for any land and buildings so purchased; shall perform all acts required to implement the plan of the committee for the transfer of property from the participating towns to the regional school district and may build, add to or equip schools for the benefit of the towns comprising the district. Such boards may receive gifts of real and and personal property for the purposes of the regional school districts. . . .

In the area of school financing, a regional board may authorize bond anticipation notes for periods of up to four years, and may treat the proceeds of the notes as other school districts or municipalities. Conn. Gen. Stats. § 10-56(c)-(d). In addition, the board may also borrow money for periods up to five years. Conn. Gen. Stats. § 10-60. While such actions by the board must be *approved* by the voters of the regional district in a referendum, it is or should be clear that this does not substantially undercut the significance of the boards' function. As stated in the amicus brief of the town of New Hartford, "*whether* to propose a bond ordinance, for what *purpose, when,* for *how much,* and in what *form* are all within the exclusive jurisdiction of the regional board." While the voters have the final word, what they ratify or disapprove can be only what the board decides to present to them. *See also Leopold* v. *Young, supra.*

Similarly, with respect to the budget-making process, the board has the exclusive power to initiate and propose. The voters may choose not to ratify, but it is within the sole power of the board to draw up the budget, and if it

is disapproved, the board then decides whether to amend and how to amend. Conn. Gen. Stats. § 10-51.

In addition, the regional school boards hire and fire teachers, supervise and discipline students, and in general manage all of the schools within their district.[9] As such, there can be no question but that the board members

> perform important governmental functions within the districts and . . . these powers are general enough and have sufficient impact throughout the district to justify the conclusion that [one person-one vote] should be applied here.

Hadley v. *Junior College District,* 397 U.S. at 53-54.

With respect to collective bargaining agreements, again the contract is negotiated by the board; a district meeting must ratify the board's action only if the chief executive officer of a constitutent town requests that a meeting be called. Conn. Gen. Stats. § 10-153d.

The power to tax is not a sine qua non to a determination that a local board serves a governmental function. The regulatory and supervisory powers possessed by the regional boards here at issue are sufficiently broad to be classified as governmental activity. *See generally Powers* v. *Maine School Administrative District No. 1,* 359 F. Supp. 30 (D. Me. 1973); *Leopold* v. *Young, supra.*[10]

Appellants' last line of argument focuses upon the Supreme Court's decisions in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973),

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9. Nor is this a complete list of the boards' powers and duties. The boards also have duties in connection with school curriculum, transportation and a wide range of support services. In short, this is not a case like *Sailors* v. *Board of Education,* 387 U.S. 105 (1967), where an appointed school board, whose duties were largely administrative, was exempted from application of one person-one vote principles.

10. Nor does having the power to tax make a given body governmental in nature. *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973).

and *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement District*, 410 U.S. 743 (1973), to diminish the force of *Hadley*. In *Salyer* and *Toltec* the Court held that one person-one vote principles did not apply to the election of members of the governing board of a California water and a Wyoming watershed district. Since the districts in issue in *Salyer* and *Toltec* had a "special limited purpose" and since the districts' action had a substantially "disproportionate effect . . . on landowners as a group," 410 U.S. at 728, 410 U.S. at 744, it was acceptable for the officers of the district to be elected by weighted vote of the district's landowners. The regional school boards' impact is general and related to all voters of the towns as such. In *Salyer*, the Court was careful to note that it was the land which was being benefited and the landowners only paying the costs; the Court also emphasized that the water district "provides no other general public services *such as a school*." *Id.* at 728-29 (emphasis added). Here we have school districts in which those towns which are paying the most for the districts' support have to accept a diluted vote[11] in the running of the schools. *Salyer* and *Toltec* are simply not relevant. The boards here are elective bodies serving governmental functions. They must be organized to reflect one person-one vote principles.

Judgment affirmed.

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11. It is of no aid to appellants that the manner in which the regional boards were to be organized was voted upon and accepted by a majority of the voters of each of the towns in the district. As the Supreme Court held in *Lucas* v. *Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 736-37 (1964):

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act.

Nor is the fact that the districts were formed pursuant to agreement of the towns. *See Leopold* v. *Young, supra.*

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and seventy-five

Present—Hon. J. JOSEPH SMITH,
Hon. ROBERT P. ANDERSON,
Hon. JAMES L. OAKES, *Circuit Judges.*
75,7001, 75-7009, 75-7015, 75-7039, 75-7040.

JOHN E. BAKER, and GERALDINE S. GEORGE,
Appellees,

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, MRS. MARION P. CROCCO, MR. GEORGE P. DAVIS, JR., MRS. JEAN VIRSHUP, MR. LOUIS KUTZNER, MRS. JEAN S. MIDDLETON, DR. FREDERICK STEIGERT, MRS. FRANK GRUSKAY, DR. HERBERT HERSHENSON, and MR. LEONARD LOHNE, individually and in their official capacities as members of the REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, DOUGLAS J. SMITH, individually and in his official capacity as Acting Superintendent OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, MR. FREDERICK ROSS, MR. HENRY W. BENEDICT, MR. HARRY I. WILSON, as Treasurers respectively of the Towns of Orange, Bethany, and Woodbridge, and MRS. MARJORIE B. WAHNQUIST, MR. SIDNEY SVIRSKY and MRS. JEAN HANNA, as Town Clerks respectively of the Towns of Orange, Bethany and Woodbridge,

Defendants,

REGIONAL HIGH SCHOOL DISTRICT No. 5 and REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT No. 5, JAMES BERRY, as Treasurer of the Town of Woodbridge (succeeding HARRY I. WILSON, deceased)

Defendants-Appellants,

JOSEPH M. SCOTT, SR.,

Plaintiff-Appellee,

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT No. 14, THE TOWN OF WOODBURY, CONNECTICUT, THE TOWN OF BETHLEHEM CONNECTICUT, TOWN OF WOODBURY, and SAMUEL J. SWENDSEN, FIRST SELECTMAN, TOWN OF BETHLEHEM,

Defendants

NONNEWAUG REGIONAL SCHOOL DISTRICT No. 14, TOWN OF BETHLEHEM,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

APPENDIX III

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-538
Civil No. N-74-75

JOSEPH M. SCOTT, SR.

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT No. 14, *et al.*,

JOHN E. BAKER, *et al.*

v.

REGIONAL HIGH SCHOOL DISTRICT No. 5, *et al.*

MEMORANDUM OF DECISION

These motions for summary judgment present identical questions concerning the applicability of one person-one vote principles to boards of education of Connecticut's regional school districts. See generally, Conn. Gen. Stat. §§ 10-39 to 10-63i. Plaintiff in Civil No. B-538 (*Scott*), a resident, taxpayer, and elector of the Town of Woodbury, seeks the reorganization of the Board of Education of Nonnewaug Regional School District No. 14, which administers the joint elementary and secondary school systems of the Towns of Woodbury and Bethlehem.[1] In Civil No. N-74-75 (*Baker*),

1. Plaintiff Scott seeks to pursue the suit as a class action. Since "any equitable relief to which [plaintiff] may be entitled would benefit all persons similarly situated, there is no compelling reason to designate a class." *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 354 F. Supp. 778, 783 (D. Conn. 1973), *modified on other grounds*, 482 F.2d 1333 (2d Cir. 1973). Class action designation is accordingly denied.

plaintiffs are residents, taxpayers, and electors of the Town of Orange, and they seek re-organization of the Board of Education of Regional High School District No. 5, which includes the Towns of Orange, Bethany and Woodbridge.

The defendants in *Scott* are Regional District No. 14, the chairman of the District's Board of Education, the Towns of Woodbury and Bethlehem, and the First Selectman of each Town.[2] In *Baker* the defendants are Regional District No. 5, its Board of Education and the members of the Board, the District's superintendent, and the treasurers and clerks of the Towns of Orange, Woodbridge and Bethany.

In addition, the Towns of Bethany and Woodbridge have moved to intervene as defendants in *Baker*. They argue that they have significant interests not adequately protected by the present defendants, and that only they are properly situated to protect the interests of their residents and electors.[3] However, the elected representatives of the voters who are already parties to this action are equal to that task. *Cf. Powers* v. *Maine School Administrative District No. 1*, 359 F.Supp. 30(D. Me. 1973); *Leopold* v. *Young*, 340 F.Supp. 1014 (D. Vt. 1972). The Towns as such do not have any substantial interest in the controversy; they are merely election districts from which board members are chosen. *Cf. Butterworth* v. *Dempsey*, 229 F.Supp. 754, 798-99 (D. Conn. 1964) (three-judge court), *aff'd sub nom. Town of Franklin* v. *Butterworth*, 378 U.S. 562 (1964). See *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Moreover, an appropriately fashioned remedy will adequately protect the Towns. See 3A Moore's Federal Practice ¶ 19.07-2[2]. The motions to intervene are denied.

2. The Town of New Hartford has moved to appear in *Scott* as *amicus curiae*. The motion is granted.

3. Other defendants have raised the same issue in the form of an affirmative defense alleging that the Towns are necessary parties without whose joinder the action cannot go forward, Fed. R. Civ. P. 19.

In both actions plaintiffs argue that the present apportionment of membership on their respective regional boards of education impermissibly dilutes their voting power and deprives them of the equal protection of the laws. They claim jurisdiction under 28 U.S.C. §1343(3), and request a variety of injunctive relief pursuant to 42 U.S.C. §1983. In *Scott* the parties have stipulated to the material facts,[4] and both actions are before the Court on motions for summary judgment.[5]

Preliminarily, the *Baker* defendants dispute this Court's jurisdiction and urge that a three-judge court must be convened to hear the suit. They rely primarily on Judge Tim-

4. Defendants in *Baker* note that in their action the parties have not entered into a stipulation and urge that summary judgment is inappropriate because a triable issue of fact is presented by disagreement about the powers of their Board. There is no dispute, however, that the powers of the Boards are defined by the Connecticut General Statutes, compare *Education/Instruccion, Inc.* v. *Moore*, F.2d (2d Cir. 1974), Slip op. at 5321 (August 21, 1974) (Oakes, J. dissenting); the only disagreement is whether as a matter of law the powers conferred by statute are sufficient to bring the Boards within apportionment requirements.

5. The *Baker* defendants oppose summary judgment on the ground that the plaintiffs are not real parties in interest, Fed. R. Civ. P. 17(a), and on the additional ground that jurisdiction of this Court has been invoked by "improper or collusive joinder," 28 U.S.C. § 1359. Rule 17(a) is designed to make certain that an action is brought by one who, by the substantive law, has the right sought to be enforced. *Rackley* v. *Board of Trustees of Orangeburg Regional Hospital*, 35 F.R.D. 516 (E.D. S.C. 1964); 3A Moore's Federal Practice ¶ 17.07, text at n. 1. But as this opinion explains, text following n. 2, *supra*, the right sought to be protected in this case is that of the Orange electors in an undiluted vote. Section 1359 is similarly designed to prevent collusive attempts to "manufacture" diversity jurisdiction, *O'Brien* v. *Avco Corporation*, 425 F.2d 1030 (2d Cir. 1969). It thus has no application in the present context. Moreover, even if, as defendants allege, officials of the Town of Orange solicited plaintiffs' participation, and even if the Town of Orange is paying the expenses of the litigation, it does not follow that there has been the kind of "collusion" at which the statute is directed *Allstate Ins. Co.* v. *Lumbermens Mutual Casualty Co.*, 204 F.Supp. 83 (D. Conn. 1962).

bers' tentative opinion in *Giordano* v. *Amity Regional High School District #5*, 313 F.Supp. 403 (D. Conn. 1970). The simple answer to this claim is one not raised by the parties in *Giordano* (although recognized as persuasive by Judge Timbers, 313 F.Supp. at 408-09, n. 9), but pressed strenuously by all plaintiffs in the present actions. Plaintiffs here do not seek to enjoin enforcement of a statute of statewide application. Compare *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 57 (1970), with *Leopold* v. *Young*, 340 F.Supp. 1014, 1017 (D. Vt. 1972). The Connecticut statutory system at issue "does not require malapportionment, but only permits towns to agree among themselves on the terms under which they will consolidate, including the apportionment of school board members." *Ibid.* See *C. Wright, Handbook of the Law of the Federal Courts* 190, text at n. 21 (1970).

The situation is no different as to Special Act 74-69, regardless of the interpretation placed on it. If, as plaintiffs urge, it merely sets the time at which board members will take office, there is no question of enjoining its enforcement. And even if, as defendants urge, it represents a "fixing" of the present apportionment of board members, it applies by its terms only to District No. 5 and is therefore not a statute of statewide application.

Moreover, as the remainder of this opinion makes clear, the law has progressed considerably since *Giordano*, and what Judge Timbers concluded was a question requiring three judges for resolution is now so clearly settled that the issue lacks the substantiality requiring a three-judge court. In such circumstances a single judge possesses the power to dispose of the case. *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Anderson* v. *Nemetz*, 474 F.2d 814 (9th Cir. 1973); *Consumer Party* v. *Tucker*, 364 F.Supp. 594, 604 (E.D. Pa. 1973). See *Utica Mutual Ins. Co.* v. *Vincent*, 375 F.2d 129, 131 n. 1 (2d Cir. 1967).

Regional District No. 14 began operating on July 1, 1968, having been approved several months earlier by separate referenda conducted in Woodbury and Bethlehem. The District's board consists of eight members, with four chosen by the electors of each of the two member towns. Plaintiff Scott bases his objection to the equal division of the membership on a comparison of the populations of the two communities. According to the 1970 census, Woodbury's population was 5,869 and Bethlehem's was 1,923, and of the 1,887 pupils attending school in the District as of May, 1973, 1,385 were from Woodbury and 492 were from Bethlehem. Finally, for each of the three consecutive academic years ending with 1973-74, Woodbury's contribution to the Regional District's budget was approximately two and one-half times as large as Bethlehem's. In short, plaintiff complains that Woodbury has roughly 75% of the joint district's population and pupils, and contributes a similar proportion of the joint district's budget, but has only 50% of the votes on the body that administers the District.

The comparable statistics for District No. 5, which commenced operations in the 1952-53 academic year, reflect a similar imbalance. Orange, the largest of the three towns, has approximately 55% of the population, 55% of the student body, and contributes 55% of the District's budget. Bethany accounts for approximately 15% of each category, and Woodbridge 30%. Each Town, however, elects three members of the nine-member joint Board of Education.

Defendants do not dispute the contention that the votes of the Woodbury and Orange electors are in fact substantially diluted. *Cf. Powers* v. *Maine School Administrative District No. 1, supra*, 359 F.Supp. at 35. Nor do they seriously contest the proposition that because the members of the Regional Boards are chosen by election[6] the one per-

6. The *Baker* defendants do suggest that the town meetings from which their Board members are elected are exercises of legislative

son—one vote rules must apply. *E.g., Hadley* v. *Junior College District of Metropolitan Kansas City,* 397 U.S. 50, 54 (1970); *Rosenthal* v. *Board of Education of Central High School District No. 3 of Town of Hempstead,* 497 F.2d 726, 729 (2d Cir. 1974).

On the merits of the motions for summary judgment defendants press only two contentions. The first is that the Regional Boards whose composition is at issue perform an insufficiently broad range of governmental functions and are therefore not the type of elective bodies to which apportionment requirements apply. Compare *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U.S. 719, 728-29 (1973). Both Regional Boards lack several significant powers that were possessed by the junior college board of trustees in *Hadley,* and defendants contend that these were essential both in *Hadley* and in similar cases. These include the power to levy and collect taxes, to issue bonds, and to pass on petitions to annex school districts and acquire property by condemnation.

Defendants' approach, enumerating the powers that these Regional Boards lack, is misconceived. *Cf. Hadley* v. *Junior College District, supra,* 397 U.S. at 53-54; *Rosenthal* v. *Board of Education, supra,* 497 F.2d at 728. The proper question is rather whether the powers the Boards *do* have in fulfilling what "has traditionally been a vital governmental function," *Hadley* v. *Junior College District, supra,*

power and not "popular elections" within the meaning of *Hadley,* and that one person-one vote requirements for that reason do not apply. Defendants do not dispute, however, that in each member town all registered voters are eligible to vote for board members, Conn. Gen. Stat. § 10-46(b). Nothing in *Hadley* indicates that the Court intended to limit its holding to elections of a particular type. On the contrary, Justice Black took pains to observe that at the center of each of the Supreme Court's reapportionment cases was "the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." 397 U.S. at 54. To accept the consequences of defendants' characterization would be to exalt form over substance at the expense of the right to vote.

397 U.S. at 56, make it reasonable to describe the board members as "government officials in every relevant sense of that term." *Ibid.*

With the question thus posed, the answer becomes clear. The powers of the two Boards before this Court do not differ significantly from those of the Board in *Rosenthal, supra,* and the only question that troubled the Court of Appeals in *Rosenthal* was whether the manner of selection of board members was more nearly elective than it was appointive; it was obvious to the Court that if the board members were elected, their powers were sufficiently governmental to invoke one person-one vote requirements. 497 F.2d at 729, text at n. 10. As the Court of Appeals has more recently observed, "there was no question [in *Rosenthal*] that the body in question performed substantial governmental functions."[7] *Education/Instruccion, Inc.* v. *Moore,* —— F.2d ——, —— (2d Cir. 1974), Slip op. at 5320 (August 21, 1974). Compare, *e.g., Dameron* v. *Tangipahoa Parish Police Jury,* 315 F.Supp. 137, 138 (E.D. La. 1970). See also, *Regional High School District No. 3* v. *Town of Newtown,* 134 Conn. 613, 620-21 (1948).

Defendants' second argument relies on dictum in *Avery* v. *Midland County,* 390 U.S. 474 (1968). They suggest that regional districts are a form of educational innovation and are for that reason immune from judicial interference, even interference in the name of equal protection. Defendants contend that requiring equal apportionment will make it unlikely that smaller towns will join regional districts, and that a legitimate attempt by the State to provide for more efficient operation of schools and improved educational opportunity for students will thereby be frustrated.

In *Avery,* which held that elections for County Commissioners Court in Texas must be conducted in accordance

7. The *Rosenthal* Board also lacked the power to set taxes. 497 F.2d at 728, n. 7 and accompanying text.

with principles of voting equality, the Supreme Court acknowledged in passing that local governments are under immense pressures to solve local problems, and denied that such experimentation is foreclosed by the Constitution. The two cases cited by the Court, however, indicate that these observations were in no way intended to encourage retreat from the Constitutional imperative. *Sailors* v. *Board of Education,* 387 U.S. 105 (1967), exempted a board whose members were appointed and whose duties were administrative, and in *Dusch* v. *Davis,* 387 U.S. 112 (1967), the Court upheld residence requirements imposed on the *members* of a multicounty legislative body, finding that the voting power of the *electors* of the component counties was not diluted. Defendants express a legitimate concern in urging that there be no needless thwarting of experimentation with regional arrangements in general or in the field of education in particular. The desirability of such arrangements, however, cannot suspend the Fourteenth Amendment's apportionment requirements. If regional school districts are to be encouraged, it will have to be done by creative legislative authorization and cooperative local arrangements that resolve the competing large and small town interests within Constitutional standards. Although the Constitution leaves a great deal of room for legitimate experimentation and innovation, it also "imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among . . . districts of substantially unequal population." *Avery* v. *Midland County, supra,* 390 U.S. at 485-86.

The only question remaining is one of remedy. Plaintiffs in both actions have requested a broad range of coercive injunctive relief, both permanent and interlocutory. Plaintiffs have clearly established that they are entitled to a

declaratory judgment, but it does not follow that the requested permanent mandatory injunction is also appropriate at this time. While it is true that the violations could be cured without legislative action, compare *Hadley* v. *Junior College District, supra,* the relatively few options presently available to defendants were designed by a legislature that may well have thought that regional districts would be free from one person-one vote requirements. Respect for the pre-eminence of the states in matters of educational policy requires, therefore, that the legislature be given a reasonable opportunity to develop new alternatives in light of this Court's declaration before an injunction issues requiring defendants to act. *Cf. Powers* v. *Maine School Administrative District No. 1, supra.* For example, the legislature may want to consider the procedures for forming new districts and for dissolving, or permitting withdrawal from, present districts now that one person-one vote principles are applicable. The General Assembly is to convene in January and should have at least two months to consider whether it wishes to frame legislation responsive to the concerns of these and other aspects of regional districts. Permanent injunctive relief will therefore be denied, without prejudice to a renewed application after March 1, 1975. At any time prior to that date, any parties may submit to the Court their proposals for reapportionment plans and implementation procedures, which the Court will review before formulating a final decree after March 1, 1975.

With respect to the requests for interim relief pending entry of a final decree, the Court is not willing needlessly to disrupt on-going educational activities pending legislative action. The requested decrees would work a substantial departure from the status quo, and the request for such relief is therefore denied. Plaintiffs are free to seek supplemental interim relief if it should appear that the

Regional Districts are about to undertake substantial building programs or make other substantial capital commitments.

Accordingly, plaintiffs' motions for summary judgment are granted,[8] and judgment will enter declaring that the allocation of membership on the Boards of Education of Nonnewaug Regional School District No. 14, and of Regional High School District No. 5, deprives plaintiffs of the equal protection of the laws in violation of the Fourteenth Amendment.

Dated at New Haven, Connecticut, this 22 day of November, 1974.

JON O. NEWMAN
United States District Judge

8. The motion of defendants in *Scott* is correspondingly denied.

APPENDIX IV

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-538
Civil No. N-74-75

JOSEPH M. SCOTT, SR.

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, *et al.*,

JOHN E. BAKER, *et al.*,

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, *et al.*

JUDGMENT

The above cases having come on for consideration by the Court on plaintiffs' Motions for Summary Judgment and the Court having rendered its Memorandum of Decision, under date of November 22, 1974, granting said motions; and the Court having rendered its Ruling on Request for Rule 54(b) Certification, under date of January 3, 1975, finding that there is no just reason for delay and specifically directing the Clerk to enter judgment on the claims for declaratory relief,

It is ORDERED and ADJUDGED that judgment be and is hereby entered declaring that the allocation of membership on the Boards of Education of Nonnewaug Regional School Dis-

trict No. 14, and of Regional High School District No. 5, deprives plaintiffs of the equal protection of the laws in violation of the Fourteenth Amendment.

Dated at New Haven, Connecticut, this 8th day of January, 1975.